United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

76-4015

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-4015

B
P/S

MARILYN INA WILLIAMS,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

RESPONDENT'S BRIEF

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MARILYN INA WILLIAMS,

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IMMIGRATION AND NATURALIZATION SERVICE,

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ISSUE PRESENTED

WHETHER THE ORDER OF THE BOARD OF IMMIGRATION APPEALS, DENYING THE PETITIONER'S MOTION TO REOPEN HER DEPORTATION PROCEEDINGS WAS AN ABUSE OF DISCRETION.

STATEMENT OF THE CASE

Pursuant to Section 106 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §1105(a), Marilyn Ina Williams petitions this Court for review of an order entered by the Board of Immigration Appeals

(the "Board") on December 30, 1975, denying her motion to reopen her deportation proceedings in order that she might apply for the discretionary relief of suspension of deportation under Section 244(a)(1) of the Act, 8 U.S.C. §1254(a)(1).

The petitioner contends that the Board's order should be set aside because she has established her statutory eligibility for suspension of deportation and further that she is worthy of the favorable exercise of discretion by the Attorney General. Since the date of filing this petition, the alien has enjoyed the automatic statutory stay of deportation which accompanies a petition for review filed pursuant to Section 106 of the Act.

STATEMENT OF THE FACTS

The petitioner is a 27 year old alien, a native and citizen of Belize, formerly British Honduras. She was admitted to the United States on October 20, 1968 as a nonimmigrant for pleasure authorized to remain in

this country until April, 1969. She failed to depart upon the expiration of her authorized visitation and has been unlawfully residing and employed in the United States since that time. On February 28, 1970, the petitioner married a lawful permanent resident of the United States and on March 31, 1970, she and her husband had a child. The petitioner and her husband were divorced on October 30, 1974 in the Supreme Court of the State of New York and petitioner was awarded custody of the child.

On August 5, 1974, the Immigration and Naturalization Service (the "Service") commenced deportation proceedings with the issuance of an order to show cause and notice of hearing. The deportation hearing was conducted on August 16, 1974 wherein the petitioner was represented by her present counsel. During the hearing, the alien conceded deportability but sought the discretionary privilege of voluntary departure pursuant to Section 244(e) of the Act, 8 U.S.C. §1254(e). The alien also testified as to her marital status as well as to

the fact that while in the United States, she had given birth to a child. The application for relief was granted by the Immigration Judge who entered an order granting the privilege to depart voluntarily on or before December 16, 1974. An alternative order of enforced deportation was also entered to become effective if the alien failed to voluntarily depart as represented at the hearing.

On December 13, 1974, three days prior to the expiration of her voluntary departure period, the alien applied for an extension of her voluntary departure for a period of one year for the express purpose of enabling her to satisfy the seven year residence requirement prerequisite to an application for suspension of deportation pursuant to Section 244(a) of the Act. In support of the application, the alien alleged the facts of her then recent divorce and the award to her of custody of the child as well as the fact that pursuant to the terms of the divorce decree, her former husband was obligated to make payments of support and maintenance

and was accorded visitation rights. The alien contended that deportation would deprive her child of the opportunity to be raised in the United States and of the benefit of paternal visitation rights and that her former husband would not honor his support and maintenance obligations.

This application was denied by the District Director of the Service on December 30, 1974. Voluntary departure was restored, however, until January 10, 1975. On January 13, 1975 a warrant of deportation was issued upon the alien's failure to depart voluntarily within the prescribed period, as extended. Nothing further was done by or in behalf of the alien and on April 8, 1975 she was notified to appear for deportation on April 21, 1975.

On April 11, 1975, the alien moved to reopen deportation proceedings to seek restoration of voluntary departure for a six-month period so that she could accrue the seven-years residence needed to apply for suspension

of deportation. In the alternative, she requested a stay of deportation pending final disposition of the motion. Aside from the grounds previously asserted, the alien merely alleged that she would become eligible to request suspension of deportation within six months and that there were no adverse factors warranting enforcement of deportation shortly before the onset of such eligibility. The application for a stay of deportation was administratively denied by letter of the same date from the Service's District Director. Voluntary departure was again restored, however, on condition that the alien depart no later than April 21, 1975. The motion to reopen was simultaneously referred to an Immigration Judge for further consideration.

A hearing on the motion was held before an Immigration Judge on April 18, 1975. The alien conceded through her counsel that it had always been her intention to postpone departure until she became eligible for suspension of deportation and, therefore, that she had never intended to depart voluntarily, notwithstanding

her request for such relief at the prior hearing of August 16, 1974. It was also conceded that the alien had separated from her spouse as early as September 28, 1972 and from that date until the date of divorce, there had been no effort toward reconciliation. The alien's counsel did not dispute receipt of the deportation warrant dated January 13, 1975 and that no challenge had been mounted thereto until April 11, 1975.

On April 18, 1975, the Immigration Judge issued a written order and decision denying the alien's motion to reopen the deportation proceedings. The decision noted that the alien had originally been granted four months to effect a voluntary departure because of her child and upon her representation that she would depart when required; that she had thereafter been given further opportunities to depart voluntarily but had chosen not to do so. The decision concluded with the following evaluation:

> There is no evidence of any substantial change in her situation since she was

> originally accorded the privilege of voluntary departure. The grant of such privilege was not intended to afford her a means of accumulating additional residence in the United States to qualify for suspension of deportation. Consequently the instant motion is found to be entirely without merit. (A. 28)

On April 22, 1975, the alien appealed the decision of the Immigration Judge to the Board*. On July 8, 1975, the Board affirmed the decision of the Immigration Judge and dismissed the petitioner's appeal. The Board observed, in agreement with the Immigration Judge, that the privilege of voluntary departure should not be granted to permit the alien to qualify for suspension of deportation.

On October 6, 1975, the alien, having finally satisfied the seven-year residency requirement,

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* Inasmuch as the Immigration Judge refused to stay deportation, the alien was subject to immediate deportation, notwithstanding the appealability of the Immigration Judge's decision. On Friday, April 18, 1975, the Government consented to an order to show cause signed by Judge Metzner of the United States District Court for the Southern District of New York which provided for a stay of deportation and a hearing before the District Court on April 28, 1975. The order was withdrawn however, upon a stipulation providing for a stay of deportation pending a final decision by the Board.

moved to reopen deportation proceedings to apply for suspension of deportation pursuant to Section 244(a)(1). On December 30, 1975, the Board denied the motion on the ground that although the alien had finally achieved the minimum period of physical presence required, she had failed to make a prima facie showing of extreme hardship sufficient to justify suspendion.

RELEVANT STATUTE

Immigration and Nationality Act, 63 Stat. 163 (1952), as amended:

> Section 244, U.S.C. §1254:
>
> (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applied to the Attorney General for suspension of deportation and -
>
> (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically presented in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that

during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

* * * * *

RELEVANT REGULATIONS

Title 8, Code of Federal Regulations (C.F.R.):

§3.2 Reopening or reconsideration.

The Board may on its own motion reopen or reconsider any case in which it has rendered a decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly authorized officer of the Service, or by the party affected by the decision, shall be only upon written motion to the Board. Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such

relief was fully explained to him and an opportunity to apply therefor was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing.

* * * * *

§3.8 Motion to reopen or motion to reconsider.

(a) Form. Motions to reopen and motions to reconsider shall be submitted in triplicate. A request for oral argument, if desired, shall be incorporated in the motion. The Board in its discretion may grant or deny oral argument. Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material.

* * * * *

ARGUMENT

THE BOARD OF IMMIGRATION APPEALS DID NOT ABUSE ITS DISCRETIONARY AUTHORITY IN DECLINING TO REOPEN THE DEPORTATION PROCEEDING TO PERMIT THE ALIEN TO APPLY FOR SUSPENSION OF DEPORTATION.

A. The Reopening Of A Deportation Proceeding Is A Matter Of Discretion.

The Immigration and Nationality Act contains no specific provision for the reopening of a deportation

proceeding. The Attorney General, under his broad grant of authority to administer and enforce the Act,* has promulgated regulations which permit reopening as a matter of discretion provided certain criteria are met. The applicable regulation, 8 C.F.R. §3.2, provides in pertinent part that motions to reopen "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." Additionally, 8 C.F.R. §3.8 provides that "motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits and other evidentiary material."

Clearly, the regulations contemplate that a motion to reopen contain an offer of evidence, that the evidence be heretofore unobtainable, and that the evidence be sufficient to warrant the grant of the relief sought. Accordingly, the Board is required to evaluate

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*Section 103(a) of the Act, 8 U.S.C. §1103(a).

any such offer of evidence against the background of the record already compiled in the alien's case. Where such evidence, even if accepted as true, would not justify a grant of the ultimate relief sought, it is obvious that no purpose would be served by reopening the proceeding. With this in mind, we now turn to examine the nature of the relief sought by this petitioner and the evidence she offered in support of her motion.

B. Suspension Of Deportation.

Suspension of deportation pursuant to Section 244(a) of the Act, 8 U.S.C. §1254(a), is the ultimate form of relief available to a deportable alien. An alien whose application is approved has his deportability cancelled and obtains status adjustment to that of a permanent resident without having to leave the United States. Authority to grant or deny this relief is vested within the sound discretion of the Attorney General. Hintopoulos v. Shaughnessy, 353 U.S. 72 (1957). Those application which are approved by the Attorney

General must be referred to the Congress for final legislative approval. Section 244(c) of the Act, 8 U.S.C. §1254(c); McGrath v. Kristensen, 340 U.S. 162 (1950).

In order to qualify for suspension of deportation, an alien must first satisfy certain objective requirements contained in the statute. He must establish that he has been physically present in the United States for at least seven consecutive years immediately preceding his application, and that he had been a person of good moral character during that period. He must also convince the Attorney General that his deportation would result in extreme hardship to himself or to a close relative who is a citizen or resident alien of this country.*

The applicant for suspension of deportation has the burden of showing that he meets these prescribed

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*The qualifying relative must be the alien's spouse, child or parent. Section 244(a)(1) of the Act, 8 U.S.C. §1254(f)(1).

conditions. 8 C.F.R. 242.17(d); Kimm v. Rosenberg, 363 U.S. 405 (1960), rehearing denied, 364 U.S. 854; Brownell v. Cohen, 250 F.2d 770 (D.C. Cir. 1957). If he fails to establish statutory eligibility, the application must be denied as a matter of law. Attainment of the statutory minimum, however, does not mean that relief will be automatically granted. The alien who satisfies the statutory requirements still has the burden of convincing the Attorney General that he merits the favorable exercise of discretion. Hintopoulos v. Shaughnessy, supra; Wong Wing Hang v. Immigration and Naturalization Service, 360 F.2d 715 (2d Cir. 1966); Kam Ng v. Pilliod, 279 F.2d 207 (7th Cir. 1960), cert. denied, 365 U.S. 860. Accordingly, when making her motion to reopen, it was incumbent upon this petitioner to offer evidence to show not only that she was statutorily eligible but that she merited the extraordinary relief sought as a matter of discretion.

C. The Board properly concluded that the alien was statutorily ineligible for suspension of deportation under Section 244(a)(1) of the Act.

The Board found that the alien had failed to make a prima facie showing of "extreme hardship" required under Section 244(a)(1) of the Act and on that basis denied her motion to reopen. The alien contests this finding on the ground that: (1) Deportation would result in the de facto deportation of her child who is a citizen and the child's separation from his father, the alien's former husband; and (2) The alien does not possess any particular employment skills with the resultant likelihood that she and her child would suffer economic "ruination" in Belize.

Neither of these grounds, however, is sufficient to make the requisite showing of extreme hardship. Economic detriment alone is not enough to qualify for relief under Section 244(a)(1). Kasravi v. Immigration and Naturalization Service, 400 F.2d 675 (9th Cir. 1968); Kwang Shick Myung v. Immigration and Naturalization Service, 368 F.2d 330 (7th Cir. 1966).

Moreover, the only claim of economic detriment asserted herein is the unsupported allegation that deportation to Belize will result in the alien's economic ruination by reason of her lack of particular employment skills. The record is devoid of any showing that the asserted lack of skill is any more detrimental in Belize than in the United States. Even were such a showing made, however, it would be insufficient since the resulting hardship, if any, would be only the usual difference in economic standards of living which exist between the United States and most other countries abroad. See Llacer v. Immigration and Naturalization Service, 388 F.2d 681 (9th Cir. 1968). Were such a showing sufficient, anyone subject to deportation to any of the vast majority of foreign states could satisfy the extreme hardship requirement simply by establishing such difference in economic standards.

The claim that deportation of the alien will result in the de facto deportation of her child is similarly an insufficient showing of extreme hardship.

Entry into the United States by aliens has always been a matter of congressional discretion and Congress did not give minor children who were "...born here due to... [their] parents' decision to reside in this country... the ability to confer immigration rights on... [their] parents." Perdido v. Immigration and Naturalization Service, 420 F.2d 1179, 1181 (5th Cir. 1969). See also Enciso-Cardozo v. Immigration and Naturalization Service, 504 F.2d 1252, 1253 (2d Cir. 1974); Dimaren v. Immigration and Naturalization Service, 398 F. Supp. 556 (S.D.N.Y. 1974). Application of Amoury, 307 F. Supp. 213 (S.D.N.Y. 1969). It is undisputed that the alien child has every right to remain in this country.* Since that right, however, does not extend to his alien parent, the alien cannot claim extreme hardship simply by contending that the child will be deprived on a de facto basis of his right to remain here.

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*There is no showing in the record that the child's right is not a viable option since his father, the alien's former husband, is a permanent resident of the United States.

As to the claim that the child will be deprived of access to his father, while it is not to be taken lightly, it should not be construed as a sufficient showing of extreme hardship within the meaning of the Act. First, there is no indication in the record that the father retains any strong interest in continued access to the child. We do not suggest that his lack of interest should be presumed. Nonetheless, the absence of any showing of such interest and indeed the absence of any challenge to the alien's deportation mounted by the father suggest that the primary objective of the argument is to advance the alien's own interests rather than those of the child. To permit the alien to claim extreme hardship on the basis of such unsupported assertions would in effect extend the child's immigration rights to his alien parent, which, as shown above, is a privilege Congress did not intend to bestow.

D. In the absence of any supporting evidence, the alien's motion to reopen was properly denied.

Even if the alien had made a sufficient prima facie showing of extreme hardship, the Board nonetheless acted properly in denying the motion to reopen. 8 C.F.R. §3.8 provides that "[m]otions to reopen shall state the new facts to be proved at the reopened proceeding..." (Emphasis added). The unsupported claims allegedly amounting to extreme hardship were known to the Immigration Judge and to the Board when they denied the alien's original motion to reopen, which is not at issue herein. The only new evidence offered in support of the alien's second motion, the subject of this petition, was the fact that the alien had finally satisfied the seven-year residency requirement. However, the dilatory tactics resorted to by the alien in achieving this goal constitute sufficient ground for denying the motion to reopen. See Acevedo v. Immigration and Naturalization Service, Docket No. 75-4246 (2d Cir. April 22, 1976); Fan Wan Keung v. Immigration and Naturalization Service, 434 F.2d 301 (2d Cir. 1970).

The alien's immigration history since the finding of her deportability on August 16, 1974 reflects a purposeful pattern of delay in order to prolong her illegal sojourn in the United States. At a hearing held on August 15, 1974 before an Immigration Judge, the alien stated under oath that if given the privilege of voluntary departure in lieu of deportation, she would depart within the period prescribed by the Service, thereafter set at four months. (A. 49, 53-54). The alien made no effort whatsoever to fulfill that commitment and her counsel conceded at a subsequent hearing that his intent had always been to delay departure in order that the alien might ultimately become eligible for suspension of deportation. (A. 33-34). Such bad faith use of the administrative process prescribed by the Act has not been tolerated by this Court. See United States ex rel. Lee Pao Fen v. Esperdy, 423 F.2d 6 (2d Cir. 1970); Lam Tat Sin v. Esperdy, 227 F. Supp. 482 (S.D.N.Y. 1964), aff'd, 334 F.2d 999 (2d Cir.), cert. denied, 379 U.S. 901 (1964). These tactics should not be tolerated herein.

E. Scope of review.

The only issue presented in this petition for review is whether or not the Board abused its discretionary authority in denying the petitioner's motion to reopen. As we have indicated, the grant or denial of a motion to reopen is discretionary. Novinc v. Immigration and Naturalization Service, 371 F.2d 272 (2d Cir. 1967). The scope of judicial review is extremely narrow. Muskardin v. Immigration and Naturalization Service, 415 F.2d 865 (2d Cir. 1969); Zupicich v. Esperdy, 319 F.2d 773 (2d Cir. 1963). Where, as here, the bare assertions made by the alien would not result in a grant of the relief sought, the denial of such a motion is not an abuse of discretion. Cheng Kai Fu v. Immigration and Naturalization Service, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968).

CONCLUSION

The petition for review should be dismissed.

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Respectfully submitted,

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Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

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Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the

5th day of August, 19 76 she served a copy of the within Respondent's Brief

by placing the same in a properly postpaid franked envelope addressed:

Charles Aronowitz, Esquire
Irving Edelman, Esquire
225 Broadway
New York, New York 10007

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this

5th day of August, 19 76

Lawrence Mason

LAWRENCE MASON
Notary Public, State of New York
No. 03-2572500
Qualified in Bronx County
Commission Expires March 30, 1977